Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

MARK PARESI, et al
Petitioner(s)

v.

CITY OF PORTLAND, OREGON
Respondent

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Department of Labor's regulation 29 C.F.R §541.118(a)(6), relating to the Fair Labor Standards Act, which authorizes employers to correct an inadvertent deduction or a deduction made for reasons other than lack of work in order to preserve the employee's exempt status under the FLSA, is available when an employer has made multiple and/or repetitive improper deductions pursuant to a policy of making such deductions, an issue as to which the court of appeals and the district courts are in conflict?

2) Whether the Department of Labor's interpretation of its own regulations should be given deference by the courts, if the interpretation by the Department of Labor was presented in an amicus brief to this Court and in a separate *amicus* brief to a District Court?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

MARK PARESI, et at, Petitioner(s),

v.

CITY OF PORTLAND, OREGON, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Mark Paresi and other Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra 1)*, is reported at No. 98-35J30, 1999 WL 39499 (9th Cir., April 16, 1999). The opinion of the district court (App., *Infra 7*) is unreported.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment on April 16, 1999. The jurisdiction of this Court is invoked under 29 U.S.C. §1254(1).

STATEMENT OF STATUTES, ORDINANCES & REGULATIONS

29 U.S.C. §213(a) provides as follows:

"Exemptions.

"(a) Minimum wage and maximum hour requirements

"The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to--

"(1) any employee employed in a bona fide executive, administrative, or professional . . ."

29 C.F.R. §541.118(6) provides as follows:

"Salary basis.

"(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be

considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future."

STATEMENT OF THE CASE

This case is consolidated from the actions of two groups of employees who brought identical claims against the City. The 35 *Paresi* Petitioners first filed their lawsuit on October 26, 1994, and the 25 *Delk* Petitioners filed their initial suit on December 7, 1994. Each suit alleged that the City inappropriately treated Petitioners as exempt from coverage under the Fair Labor Standards Act (FLSA), 29 U.S.C. §201 et seq., and that the Petitioners are therefore entitled to unpaid overtime compensation for hours worked in excess of 40 per week.

I. Statement Of Facts.

The two cases were consolidated by the district court on March 6, 1995. The jurisdiction of the district court was conferred by the Fair Labor Standards Act, 29 U.S.C. §216(b). The Respondent, City of Portland (City), is a political subdivision of the State of Oregon and therefore it is subject to the provisions of the FLSA. 29 U.S.C. §203(e)(2)(C).

Prior to 1994, the City's charter and personnel policies specified that the City had the authority to impose unpaid disciplinary suspensions or reductions of pay in less than full workweek increments upon the Petitioners. The *Paresi* Petitioners are employed by the City's Police Bureau. Under the Police Bureau's "Complaint and Disciplinary Process" and the City's general disciplinary rules, these petitioners are subject to suspensions of less than a week without pay for offenses that are unrelated to safety violations.

The *Delk* Petitioners are managerial employees from various City Bureaus. These Petitioners also are subject to the City's general disciplinary policies and the disciplinary policies of the various Bureaus of the City individually for which they are respectively employed. These disciplinary policies provided for disciplinary suspension of less than a week without pay.

Various Bureau managers testified in both depositions and affidavits that they believed they had the authority to discipline salaried employees by imposing suspension without

pay for periods less than a week and that they did impose such disciplinary suspensions. The District Court found that two of the Petitioners had been suspended for periods of less that a workweek resulting in deductions from their pay. Additionally, the District Court found that four others were threatened with suspension, but the suspensions were not imposed.

In 1994, the City adopted a new employment policy which provided that employees it claimed as exempt under the FLSA could not be suspended without pay for increments of less than a workweek. The Human Resources Director for the City testified that this change in policy occurred in response to litigation brought about by exempt employees of the Portland Fire Bureau. In 1997, the City acknowledged that the two actual deductions may have been improper, reimbursed the employees for the invalid deduction, and indicated it would comply with the FSLA in the future.

II. Proceedings Below

The District Court granted the City's motion for summary judgment. The District Court first held that there were contested issues of fact as to whether Petitioners were salaried employees. In particular, the District Court found there were contested fact issues as to whether the City had a particularized employment policy which subjected Petitioners to disciplinary suspensions without pay in increments of less than a workweek. The District Court found, however, that the City was entitled to use the "window of correction" to avoid liability in this matter. On March 4, 1999, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's ruling, holding that the "window of correction" was available to the City.

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE OF A CONFLICT IN THE COURTS AS TO WHETHER THE "WINDOW OF CORRECTION" APPLIES WHERE AN EMPLOYER HAS A POLICY OF MAKING IMPROPER DEDUCTIONS FROM AN EMPLOYEE'S PAY

In *Auer v. Robbins*, 519 U.S. 452 (1997), this Court upheld the validity of the Department of Labor's (DOL) regulations concerning exemptions from the FLSA for executive, administrative, and professional employees. Those regulations allow an employer to claim an employee as exempt if the employee is salaried, and if the employee has job duties which qualify for one of the exemptions. Because the *Auer* case involved a substantial question of the propriety of the application of the DOL's regulations to public sector employers, this Court invited the DOL to submit an *amicus* brief explaining its "salary" regulations. In its *amicus* brief, the DOL interpreted the salary basis test to deny exempt status when employees are covered by a policy that permits disciplinary or other deductions in pay "as a practical matter." As adopted by this Court, that standard is met if there is either an actual practice of making such deductions or if an employer has an employment policy that creates a "significant likelihood" of such deductions.

In a separate regulation, the DOL has allowed employers a so-called "window of correction" that applies in some circumstances where an employer has been improperly treating employees as exempt. The "window of correction," not found in the FLSA itself, provides that where the exemption is lost through the making of an inappropriate deduction, the employer may avoid liability by correcting the deduction:

> "The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be lost if the employer reimburses the employee for such deductions and promises to comply in the future." 29 C.F.R. §541.118(a)(6).

Immediately after this Court's approval of the DOL's general salary regulations in *Auer*, questions arose in the lower

courts as to how the "window of correction" applied where an employer had made inappropriate deductions from salary in the past. In *Auer* itself, this Court approved of the use of the "window of correction" by an employer who had made one improper deduction, and who had no particularized policy allowing the making of improper deductions. Nothing in this Court's opinion in *Auer*, however, dealt with the application of the "window of correction" to an employer with a policy that subjected employees to the likelihood of impermissible deductions.

Federal district and appeals courts around the country are in conflict as to whether the "window of correction" applies in cases where an employer's policy subjects employees to the likelihood that impermissible deductions will be made. The Second, Seventh and Tenth Circuits apply a narrow interpretation to the "window of correction" provision, holding that pay deductions made pursuant to a particularized disciplinary policy may not be corrected by application

of the "window of correction." *Klein v. Rush-Presbyterian- St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993); *Spradling v. City of Tulsa, Oklahoma*, 95 F.3d 1492 (10th Cir. 1996); *Martin v. Malcolm Pirnie*, Inc, 949 F.2d 611 (2nd Cir.1991). On the other hand, the Ninth and Eleventh Circuits have held that an employer can preserve the employees' exempt status pursuant to the "window of correction" even when there is an established policy of improper deductions and reoccurring improper deductions have occurred. *Paresi v. City of Portland*, No. 98-35530, 1999 WL 394999 (9th Cir. April 16, 1999) (App. 1); *Davis v. City of Hollywood,* 120 F.3d 1178 (11th Cir. 1997).

The district courts are also in conflict regarding the application of the "window of correction." The district courts in *Arrington v. City Macon*, 973 F.Supp. 1467 (M.D.Ga. 1997), *Kuchinskas v. Broward County*, 840 F.Supp. 1548 (S.D.Fla. 1993), and *Simmons v. Fort Worth, Texas*, 805 F.Supp. 419 (N.D.Tex 1992), have

generally held that the "window of correction" is available to employers regardless of whether the employer has a practice of such deductions. The majority of district courts have held to the contrary. In *Belcher v. Shoney's, Inc.*, 30 F.Supp.2d 1010 (M.D.Tenn. 1998), *Hoffmann v. Sbarro, Inc.*, 982 F.Supp. 249 (S.D.N.Y. 1997), *Muston v. MKI Systems, Inc.*, 951 F.Supp. 603 (E.D.Va. 1997), *Close v. State of New York*, 3 Wage & Hour Cas.2d (BNA) 225 (N.D.N.Y. 1997), *Local 359 Gary Firefighters v. City of Gary, Indiana*, 3 Wage & Hour Cas.2d (BNA) 1846 (N.D.Ind. 1995) have held that the "window of correction" is unavailable to employers that have a disciplinary policy that allows inappropriate deductions. *See Danesh v. Rite Aid Corporation*, 39 F.Supp.2d 7 (D.D.C. 1999); *Rushing v. Shelby County Government*, Docket No. 95-2485-V, 1997 WL 901901 (W.D.Tenn. 1997). And, in apparently the only case on the issue in which the DOL has participated as an *amicus*, (App.

68), *Klem v. County of Santa Clara*, 1998 WL 440425 (N.D.Cal. July 9, 1998), the court adopted the DOL's position that the "window of correction" is unavailable where an employer has a policy that subjects employees to the likelihood of impermissible deductions.

The consequence of allowing employers such as the City in this case to avail themselves of the "window" regardless of the existence of a policy allowing impermissible deductions or the number of impermissible deductions produces illogical results. An employer could impose innumerable impermissible disciplinary suspensions on otherwise exempt employees, could have a clearly articulated policy that effectively communicates to employees that inappropriate deductions will be made, could then wait until the first employees bring a lawsuit against it, reimburse the employees, and promise to comply with the law in the future, thereby avoiding all liability. As the DOL has put it, such an interpretation, adopted by

the Ninth Circuit in this case, would allow employers to be able to flout the salary test, and "[t]he Secretary did not intend to provide employers that engage in a practice of making impermissible deductions under the 'salary basis' test with such an escape hatch." *Secretary of Labor's Brief as amicus curiae at 14-15, Klem v. City of Santa Clara,* 1999 WL 440425 (app. 93).

Not only do the ultimate decisions of courts on the "window of correction" issue differ drastically, so do the approaches taken by the courts to the analysis of the issue. Moreover, the courts' approaches are hallmarked by entirely inconsistent degrees of deference given to the DOL's interpretation of its own regulations.

In *Auer*, this Court ruled that the *amicus* brief submitted by the DOL regarding its interpretation of the "window of correction" regulation should be given great deference. 519 U.S. at 462. Furthermore, this Court held that the DOL's interpretations of its

regulations were to be given no less weight because they were in the form of an *amicus* brief as long as they were not "post hoc rationalization[s]." *Id.* In the *amicus* brief, the DOL noted: "The window of correction is not open when an employer engages in a pattern of improper deductions. The window is open, however, to correct a one-time deduction of less than a week's pay." Secretary of Labor's Brief as Amicus Curiae at 15, *Auer v. Robbins*, 519 U.S. 452 (1997) (No. 1758).

Subsequent to *Auer*, the DOL submitted an *amicus* brief in *Klem v. City of Santa Clara*, *supra*. In the *Klem* brief, the DOL expressly states that the "window of correction" is not open to an employer with a policy of making impermissible deductions:

> "'[T]he window of correction' regulation discusses deductions in the plural when pointing to a situation where there is no intent to pay on a 'salary basis' — 'where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employees on a salary basis.' Whereas the regulation discusses a singular deduction when demonstrating a

> situation where there is an intent to pay on a 'salary basis' — 'on the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost.'" *Secretary of Labor's Brief* at 12 n. 6 (citations omitted)(emphasis in original).

In this case, the Ninth Circuit dismissed in a footnote Petitioners' arguments that the DOL's interpretation of its own regulation should be shown deference. *Paresi*, 1999 WL 394999, at *2 n.2. (App. 5) Though Petitioners discussed the issue extensively before the Ninth Circuit and submitted the DOL's *Klem* brief to the court for consideration, the court failed to even address the impact of the *Klem* brief. *See Danesh v. Rite Aid Corporation*, 39 F.Supp.2d 7 (D.D.C. 1999); *Rushing v. Shelby County Government*, Docket No. 95-2485-V, 1997 WL 901901 (W.D.Tenn. 1997); and *Belcher v. Shoney's, Inc.*, 30 F.Supp.2d 1010 (M.D.Tenn. 1998).

Other cases involving the "window of correction" have given varying degrees of deference to the DOL's interpretation of its regulations. In *Davis v. City of Hollywood*, *supra*, the Eleventh Circuit did not mention Secretary's interpretation of the regulation. The court in *Arrington v. City of Macon*, 973 F.Supp. 1467 (M.D.Ga. Aug. 7, 1997) likewise made no reference to the DOL's interpretation of its regulations. In *Hoffman v. Sbarro*, 982 F.Supp. 249, 257 (S.D.N.Y. 1997), however, the District Court directly based its opinion on the DOL's judgment that the "window of correction" is unavailable to an employer that has a policy of impermissible deductions and has implemented that policy through the making of actual deductions.

The consequence of the inconsistent approach to the DOL's regulations has resulted in the anomalous situation where the DOL has repeatedly stated that its "window of correction" regulation means one thing, but

courts such as the Ninth Circuit in this case have held that the regulation means something quite entirely different. The lack of deference to administrative interpretations of regulations is contrary to the specific holding of this Court in *Auer*, and has led to confusion in the lower courts as to precisely what import agency interpretations of regulations should have. In addition, the lack of deference to agency expertise is contrary to this Court's approach in cases decided over the last five years concerning the appropriate accord courts should give to administrative regulations. *See Auer,* 519 U.S. 905, *Olmstead v. L.C. ex rel. Zimring*, 1999 WL 407380 (U.S.) No. 98-536, *Abbot v. Bragdon*, 524 U.S. 624 (1998), *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944).

Lastly, Petitioners note that the Ninth Circuit's succinct decision in this case is seemingly based on the alternate ground that the presence of two inappropriate

deductions from pay does not suffice to meet the DOL's standard of an impermissible pattern of inappropriate deductions sufficient to deprive an employer of the ability to claim an exemption under 29 U.S.C. §213(a). What the Ninth Circuit failed to address is that this Court held in *Auer* that the talisman for the loss of the §213(a) exempt is when an employer "effectively communicates" to employees that they may be subject to deductions from pay. An employer can make such an effective communication in one of two ways – either by engaging in a pattern of impermissible deductions or by having a particularized policy allowing such deductions. Here, the District Court found that there were disputed issues of fact as to whether the City had a policy allowing such deductions. The Ninth Circuit's comment in its decision that two impermissible deductions did not amount to the requisite pattern of deductions did not address in any fashion the fact that there is significant evidence that the City had an effectively communicated policy of such deductions.

CONCLUSION

This cases presents two issues of significant importance. First, the lower federal courts are deeply divided as to the appropriate interpretation of the DOL's salary test, and have reached diametrically opposed conclusions based on virtually identical facts. Second, in seeming contravention of this Court's decision in *Auer*, the Ninth Circuit in this case has eschewed reliance on the DOL's interpretation of its own regulation, reaching the conclusion that the regulation does not mean what the DOL adamantly says it means. This failure to accord deference to administrative agency expertise is contrary to a series of this Court's recent decisions. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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